Filed 3/27/19 Perez v. Kislinger CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

DANIEL A. PEREZ, Plaintiff and Appellant, v. MARK KISLINGER, M.D., et al., Defendants and Respondents.	B288188 (Los Angeles County Super. Ct. No. GC050933)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura A. Matz, Judge. Affirmed.

Daniel A. Perez, in pro. per., for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Howard A. Slavin and Judith M. Tishkoff for Defendants and Respondents Ron P. Gallemore, M.D., Retina Macula Institute and Ron P. Gallemore, M.D., Ph.D., Inc.

Reback, McAndrews & Blessey, Raymond L. Blessey and Tracy D. Hughes for Defendants and Respondents Mark Kislinger, M.D. and Foothill Eye Care Center, a Medical Corporation.

Daniel A. Perez (appellant) appeals from a judgment dismissing his medical malpractice action. Appellant filed the action on February 8, 2013, naming as defendants Mark B. Kislinger, M.D. (Kislinger); Foothill Eye Care Center, a Medical Corporation (Foothill); Ron P. Gallemore, M.D. (Gallemore); Retina Macula Institute (RMI); and Does 1 to 100 (collectively respondents). On February 8, 2018, the trial court entered a judgment dismissing the action. When the matter came on for trial on January 22, 2018, appellant had failed to designate expert witnesses to prove his claim. The trial court determined that "without expert testimony it would be impossible for [appellant] to prove his claim of medical malpractice," thus it ordered the matter dismissed.

Appellant, who appears before this court in pro. per., makes no factual or legal argument that the judgment was entered in error. Therefore we affirm the judgment.

BACKGROUND

This lawsuit arises out of alleged medical malpractice involving treatment to appellant's eyes during the period from 2007 through 2012.

On June 23, 2015, the trial court granted summary judgment in favor of defendants Kislinger and Foothill. On October 13, 2017, the trial court granted a motion to correct the June 23, 2015 judgment. Specifically, the judgment was amended "to substitute the name 'FOOTHILL EYE CARE CENTER, A MEDICAL CORPORATION' for the name 'FOOTHILL EYE CARE CENTER,'" wherever it appeared in the judgment. The court held that the substitution did not affect any substantial right of appellant, and that while the corporation was suspended at some point, it had been revived.

Appellant's third amended complaint (TAC), filed on June 6, 2016, alleged causes of action for medical malpractice, medical

battery, fraudulent concealment, and intentional infliction of emotional distress against respondents.[1]

On June 14, 2016, Gallemore and RMI (collectively "Gallemore") answered the TAC. On August 9, 2016, appellant filed a request for entry of default against "Ron P Gallemore -- a CA Medical Corp" and "George S. Takeda -- a CA Medical Corp." Default was entered.

At a January 16, 2018 hearing, the court noted that the statute requiring a matter be brought to trial within five years of filing, would run on February 7, 2018.[2] The court further noted that appellant had not produced an expert witness. The court granted defendants' motion in limine No. 2, precluding inquiry into the medical opinion of undesignated physicians or experts. The court also vacated and set aside the default entered on August 9, 2016, as the defendant filed an answer to appellant's TAC on June 14, 2016.

The matter came on for trial on January 22, 2018. The court determined that "without expert testimony it would be impossible for [appellant] to prove his claim of medical malpractice." Thus, it ordered the matter dismissed, and judgment be granted for defendants.

On February 8, 2018, appellant filed his notice of appeal.

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[1] George S. Takeda, M.D., was named in the body of the TAC as an additional defendant, but was not named in the caption of the document.

[2] See Code of Civil Procedure section 583.310.

DISCUSSION

Appellant's opening briefs do not provide sufficient information for a determination of the legal and factual basis for this appeal.

A judgment or order of the lower court is presumed correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*).) "'All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Ibid.*) Thus, it is appellant's obligation to articulate claims of reversible error and "present argument and authority on each point made." (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591.) An appellant's failure to meet this burden may be considered an abandonment of the appeal. (*Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119.)

Appellant has failed to satisfy these obligations in this appeal. His opening brief is largely devoid of citations to the record. The record appears deficient. In addition, appellant has failed to cite supporting legal authority for the points he attempts to make. We are "'not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment. . . . Accordingly every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citation.] [¶] It is the duty of [appellant], not of the courts, 'by argument and the citation of authorities to show that the claimed error exists.' [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050.)

Appellant's decision to act as his own attorney on appeal does not entitle him to any leniency as to the rules of practice and procedure. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985.)

Since the issues in appellant's opening brief are not properly presented or sufficiently developed to be cognizable, we decline to consider them and treat them as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *In re David L.* (1991) 234 Cal.App.3d 1655, 1661.)

Appellant attempts to challenge two rulings below: (1) the order setting aside the default of Gallemore; and (2) the order granting defendants' motion to correct the judgment entered on June 23, 2015. To the extent that we can ascertain appellant's arguments and the relevant facts, we briefly address these claims.

I. Order vacating default

Appellant contends that the trial court erred in vacating the default entered as to Gallemore. Appellant appears to argue that the defendant did not answer the TAC. However, the record contains an answer filed June 14, 2016, on behalf of the Gallemore defendants. In vacating the default, the trial court noted that this answer had been filed.

Appellant makes no comprehensible argument as to how the trial court erred. An order setting aside a default is reviewed for abuse of discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 331.) A reviewing court should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice. (*Denham, supra*, 2 Cal.3d at p. 566.) The burden is on the complaining party to establish such an abuse of the trial court's discretion. (*Ibid.*)

Appellant has failed to carry his burden in this matter. His only argument seems to be a statement of his position that the

trial court was incorrect in noting that an answer was filed by the Gallemore defendants.[3] However, the answer is in the record.

Further, there is no miscarriage of justice. Code of Civil Procedure section 580 limits the relief available on default to that which was "demanded in the complaint." Appellant's TAC does not demand any specific amount of monetary damages.[4] Code of Civil Procedure section 425.11 requires that a plaintiff in a personal injury case give notice to a defendant in the form of a statement of damages prior to entry of a default. (Code Civ. Proc., § 425.11, subd. (b), (c).) A default judgment is void if no statement of damages is served before a default is entered. (*Stevenson v. Turner* (1979) 94 Cal.App.3d 315, 318.) Appellant does not assert that he served on any defendant a statement of damages prior to the entry of the default in this matter. Thus, the default was void.

Finally, judgment against appellant was entered in this matter due to his failure to secure an expert to testify on his behalf within the five-year time frame allowed to bring a case to trial. Appellant fails to address how relief from default has harmed him under the circumstances.

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[3] Appellant asserts, "Trial Court alleged on June 14, 2016 this defendant answer Third Amended Complaint, FALSE, this Defendant don't answer."

[4] Code of Civil Procedure section 425.10 provides that in personal injury cases, such as this medical malpractice case, "the amount demanded shall not be stated."

II. Order granting motion to correct judgment

Appellant's next point of error concerns the court's order granting a motion to correct a defendant's name.[5] The court amended the June 23, 2015 order granting summary judgment to replace the name "'FOOTHILL EYE CARE CENTER'" with the name "'FOOTHILL EYE CARE CENTER, A MEDICAL CORPORATION.'" The court noted that, "The opposition does not argue that amending the name of the defendant by adding the phrase, 'a medical corporation,' would affect any substantial right of plaintiff." Appellant makes no argument on appeal that any substantial right has been affected.

Appellant appears to accuse Foothill of using a "fictitious defendant" in order to hide its legal status. There is, included in the record, a computer printout dated January 23, 2013, which indicates that the entity captioned "Foothill Eye Care Center, a Medical Corporation" was suspended as of that date.[6] However, the printout is not attached to any declaration, nor is it clear how or when it was filed in the trial court. The trial court noted that "While the medical corporation may have been suspended at some point, the corporation was revived." In the absence of any clearly articulated argument to the contrary, we presume the trial court's determination that the name change was inconsequential is correct. (*Denham, supra*, 2 Cal.3d at p. 564.)

Finally, appellant has again failed to address the dismissal of his case for lack of expert testimony. Regardless of the name of

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[5] Though the motion itself is not included within the record on appeal, the trial court's minute order granting the motion is included. Thus, we are without specific information as to the date of the filing of this motion or the moving parties.

[6] The same document is attached as exhibit 3 to appellant's reply brief.

any defendant, appellant failed to prove his case. Thus, any error as to the name of any party is harmless. In the absence of any coherent argument to the contrary, we presume the trial court's judgment dismissing the matter was correct. (*Denham, supra*, 2 Cal.3d at p. 564.)

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT